Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc. Request for	)	
Declaratory Ruling that State Commissions May	)	WC Docket No. 03-251
Not Regulate Broadband Internet Access Services	)	
by Requiring BellSouth to Provide Wholesale or	)	
Retail Broadband Services to Competitive LEC	)	
UNE Voice Customers	)	
	)	

MEMORANDUM OPINION AND ORDER AND NOTICE OF INQUIRY

Adopted: March 17, 2005 **Released:** March 25, 2005

Comment Date: [60 days after publication in the Federal Register]
Reply Comment Date: [90 days after publication in the Federal Register]

By the Commission: Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing a joint statement.

I. INTRODUCTION

1. The Commission has before it a petition for declaratory ruling filed by BellSouth Telecommunications, Inc. (BellSouth) regarding issues stemming from the *Triennial Review Order*.[1] As explained below, because the Commission's national unbundling rules in the *Triennial Review Order* directly address the primary issue raised by BellSouth, we grant BellSouth's petition to the extent described in this Order.[2] Specifically, applying section 251(d)(3) of the Communications Act of 1934, as amended (the Act), we find that a state commission may not require an incumbent local exchange carrier (LEC) to provide digital subscriber line (DSL) service to an end user customer over the same unbundled network element (UNE) loop facility that a competitive LEC uses to provide voice services to that end user. For the reasons set forth below, we conclude that state decisions that impose such an obligation are inconsistent with and substantially prevent the implementation of the Act and the Commission's federal unbundling rules and policies set forth in the *Triennial Review Order* that implement sections 251(c) and

[1] BellSouth Emergency Request for Declaratory Ruling, WC Docket No. 03-251 (filed Dec. 9, 2003) (BellSouth Petition).

[2] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

(d)(2) of the Act.

II. BACKGROUND

2. For several years, BellSouth has implemented throughout its operating region a policy not to sell DSL service to end user customers purchasing voice services from competitive LECs utilizing UNE loops. Subsequently, several state commissions reviewed BellSouth's policy and ordered BellSouth to provide DSL service to competitive LEC UNE voice customers. Below, we describe the development of the Commission's unbundling rules, specifically the Commission's loop unbundling rules and the Commission's interpretation of the appropriate state role in implementing the unbundling policies of the Act. We then describe the state commission decisions from which BellSouth seeks relief. Lastly, we briefly describe the grounds upon which BellSouth seeks relief from these state commission rulings.

A. Commission Decisions

3. In 1996, the Commission issued its *Local Competition First Report and Order* implementing the 1996 Act and establishing, among other things, a federal standard for the terms under which unbundled network elements must be provided pursuant to the Act's "impair" standard.[3] At the same time, the Commission also defined the scope of rights surrounding a leased UNE, indicating that "especially" for loops, "the requesting carrier will purchase *exclusive* access to the element for a specific period of time," although the incumbent LEC maintains underlying physical control (such as the ability to repair and maintain UNEs).[4]

4. In 1999, in response to a remand from the Supreme Court, the Commission redefined its national impairment standard and unbundling determinations in the *UNE Remand Order*.[5] In the *UNE Remand Order*, the Commission found that state commissions were not permitted to remove national unbundling obligations, even pursuant to state law.[6] However, the Commission found that states were free to add network unbundling obligations pursuant to state law, either through rulemaking or the state arbitration role, so long as the state commission considered and made decisions consistent with the federal

[3] *See generally* 47 U.S.C. § 251; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*) *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand, Iowa Utils Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997).

[4] *Local Competition First Report and Order*, 11 FCC Rcd at 15631, 15635, paras. 258, 268 (emphasis added); 47 C.F.R. § 51.309(c).

[5] *See generally Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3767, para. 154 (1999) (*UNE Remand Order*), *reversed and remanded in part sub nom United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 538 U.S. 940 (2003 Mem.).

[6] 47 C.F.R. § 51.317(b)(4) (2000); *UNE Remand Order*, 15 FCC Rcd at 3767-70, paras. 153-61.

unbundling standard.[7]

5. In 1999, the Commission issued its *Line Sharing Order*, which required incumbent LECs to provision the high frequency portion of the loop (HFPL) as a separate unbundled network element when the incumbent LEC provisioned voice service on the low frequency portion of the loop (LFPL).[8] In 2001, acting on various petitions for reconsideration and clarification, the Commission issued its *Line Sharing Reconsideration Order*.[9] Together, these orders established policies governing three possible ways to share a loop facility between different carriers. First, these orders confirmed that the line sharing obligation was limited to incumbent LEC voice service combined with competitive LEC data service, provided over the same loop.[10] Second, the *Line Sharing Reconsideration Order* required incumbent LECs to enable line splitting – the sharing of a single loop facility between a competitive carrier providing voice services and a competitive carrier providing data services.[11] Third, and most pertinent here, these orders confirmed that incumbent LECs have no obligation under the Commission's rules to provide DSL service over the HFPL of an unbundled loop used by a competitive LEC to provide voice service over the LFPL – a requirement that would effectively mandate unbundled access to the LFPL for the competitive voice provider.[12] Indeed, the Commission stated that "the *Line Sharing Order* . . . does not require that [incumbent LECs] provide [access to the HFPL] when they are not [sic] longer the voice provider."[13]

6. Additionally, in several orders prior to the *Triennial Review Order* approving carriers' applications for authorization to provide interLATA services pursuant to section 271, the Commission reaffirmed that incumbent LECs were under no section 251 obligation to provide access to the HFPL

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[7] *Id.*

[8] *Deployment of Wireline Services Offering Advanced Telecommunications Ability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20947, para. 72 (1999) (*Line Sharing Order*) *vacated*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[9] *Deployment of Wireline Services Offering Advanced Telecommunications Ability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket Nos. 98-147, 96-98, Third Report and Order on Reconsideration and Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fourth Report and Order on Reconsideration and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001) (*Line Sharing Reconsideration Order*).

[10] *Line Sharing Order*, 14 FCC Rcd at 20915-16, para. 4; *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2104-05, para. 5. As explained above, the Commission's line sharing rules were vacated by the D.C. Circuit. However, the Commission reaffirmed in its *Triennial Review Order* this same limitation on line sharing, requiring such sharing only under an express three-year phase out plan. *See Triennial Review Order*, 18 FCC Rcd at 17137-41, paras. 264-69.

[11] *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2109-14, paras. 14-25. The Commission readopted and clarified in its *Triennial Review Order* the requirement that incumbent LECs enable line splitting between competing carriers. *See Triennial Review Order*, 18 FCC Rcd at 17130-31, paras. 251-52; 47 C.F.R. § 51.319(a)(1)(ii).

[12] *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2114, para. 26. We note that unlike in the *Triennial Review Order*, the Commission did not undertake an impairment analysis specific to the LFPL in the *Line Sharing Order* and *Line Sharing Reconsideration Order*.

[13] *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2114, para. 26.

when a competitive LEC is providing voice service over the LFPL, finding no federal requirement to unbundle only the LFPL, and finding that this lack of unbundling was not discriminatory. In both the *Texas 271 Order* and the *Georgia/Louisiana 271 Order*, the Commission found that "[u]nder our rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop."[14] Moreover, the Commission stated that its rules "did not unbundle the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service" over a UNE platform.[15] The Commission did not find the practice of refusing to offer DSL where the end user was served by a competitive LEC using UNEs to be discriminatory, reasoning that a "UNE-P carrier has the right to engage in line splitting on its loop" and, therefore, "a UNE-P carrier can compete with [the BOC's] combined voice and data offering on the same loop by providing a customer with line splitting voice and data service over the UNE-P in the same manner."[16]

7. On August 21, 2003, the Commission released the *Triennial Review Order* in which it completely revised its unbundling rules. The Commission's *Triennial Review Order* made several important changes in the national unbundling policy, four of which are directly relevant in the instant proceeding. First, the Commission adopted a different impairment standard stating, "[w]e find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[17] This impairment standard serves as the foundation for the Commission's specific unbundling determinations. Second, the Commission, applying the newly adopted standard described above, developed new rules for loop unbundling. These rules also accounted for Congress's mandate – set forth in section 706 of the Act – that the Commission consider the impact that its rules would have on the deployment of advanced telecommunications capability and thus curtailed unbundling in instances where the Commission found the costs of unbundling, including disincentives for innovative deployment, outweighed the benefits of unbundling.[18] Third, the Commission explicitly determined, as it had previously, not to unbundle the LFPL.[19] Finally, the Commission reasoned that a state decision,

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[14] *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No.00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18517-18, para. 330 (*Texas 271 Order*); *see also Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9100-01, para. 157 (*Georgia/Louisiana 271 Order*).

[15] *Texas 271 Order*, 15 FCC Rcd at 18517-18, para. 330; *see also Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9100-01, para. 157.

[16] *Id.*

[17] *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84. On appeal, the D.C. Circuit observed that this "touchstone of the Commission's impairment analysis" may be "too open-ended," but did not expressly rule on this matter. *USTA II*, 359 F.3d at 572. The Commission addressed the D.C. Circuit's concerns on this point in the *Triennial Review Remand Order* described *infra* para. 7.

[18] 47 U.S.C. § 157 nt (§ 706 of the Act).

[19] *Triennial Review Order*, 18 FCC Rcd at 17141, para. 270. While this particular Commission ruling was not expressly addressed by the *USTA II* court, the D.C. Circuit upheld the Commission's mass market loop unbundling rules, including rules addressing unbundled access to the HFPL. *See USTA II*, 359 F.3d at 578-85.

pursuant to state law, to unbundle an element for which the Commission has either found no impairment or otherwise declined to require unbundling on a national basis, would likely conflict with and "substantially prevent" implementation of the federal regime, in contravention of the Act's specific and limited reservation of state authority.[20] Importantly, it is under these rules that we review BellSouth's petition and the various state decisions.

8. On February 4, 2005, the Commission released the *Triennial Review Remand Order* in which it addressed several issues on remand from the D.C. Circuit.[21] Importantly, the Commission concluded that incumbent LECs are not obligated to unbundle mass market local circuit switching, the key element used to complete the UNE-Platform (UNE-P).[22] To avoid disruption in the marketplace, the Commission ordered a 12-month transition period to allow competitors to move their preexisting UNE-P customers to alternative arrangements.[23] Among other things, the Commission also clarified that its impairment standard, announced in the *Triennial Review Order* and reviewed by the D.C. Circuit, is based on a "reasonably efficient competitor" standard.[24]

B. State Decisions

9. BellSouth points to four states in its operating region that have required LFPL unbundling, as well as several other state proceedings on the same issue. Below, we briefly summarize these state proceedings.

10. *Florida*. The Florida Public Service Commission (Florida Commission) has made determinations in two separate interconnection arbitration proceedings. First, in a section 252 interconnection agreement arbitration between BellSouth and Florida Digital Network (FDN), the Florida Commission ordered BellSouth to continue to provide FastAccess (BellSouth's retail DSL Internet access service) to existing customers that subsequently chose another company to provide their voice service over UNE loops.[25] Specifically, the Florida Commission ordered that "BellSouth shall continue

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[20] *Triennial Review Order*, 18 FCC Rcd at 17101, para. 195 (quoting 47 U.S.C. § 251(d)(3)). The *Triennial Review Order* clarified that Commission determinations not to unbundle elements, such as the LFPL, are national in scope and that it would be "unlikely" that a state regulation would not conflict with federal rules if it required unbundling where the Commission found no unbundling obligation, reasoning that such state requirements would create confusion and disincentives for investment. *Triennial Review Order*, 18 FCC Rcd at 17101, para. 195-96.

[21] *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. February 4, 2005) (*Triennial Review Remand Order*).

[22] *Triennial Review Remand Order* at paras. 199-225.

[23] *Triennial Review Remand Order* at paras. 226-28.

[24] *Triennial Review Remand Order* at paras. 23-27.

[25] BellSouth Petition, Attach. 3, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996* , Docket No. 010098-TP, Final Order on Arbitration, Order No. PSC-02-0765-FOF-TP (Fla. Pub. Serv. Comm'n June 5, 2002) (*Florida June 5, 2002 FDN Order*); *see also* BellSouth Petition, Attach. 4, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order Denying Motions for Reconsideration, Cross-Motion for Reconsideration and Motion to Strike, Order No. PSC-02-1453-FOF-TP (Fla. Pub. Serv. Comm'n Oct. 21, 2002); BellSouth Petition, (continued....)

to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops."[26] The Florida Commission, however, stated that "this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service, but as an exercise of our jurisdiction to promote competition in the local voice market."[27] Second, in a subsequent section 252 interconnection arbitration between BellSouth and Florida Supra Telecommunication and Information Systems, Inc. (Supra), the Florida Commission required BellSouth to "continue providing FastAccess even when BellSouth is no longer the voice provider."[28] The Supra agreement applies to customers served via UNE-P. Both the FDN and Supra decisions are on appeal to the United States District Court for the Northern District of Florida.[29]

11. *Kentucky*. In a section 252 interconnection agreement arbitration between BellSouth and Cinergy Communications (Cinergy), the Kentucky Commission ordered BellSouth to provide DSL service to customers receiving service over competitive LEC UNE-P lines.[30] Specifically, the Kentucky

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Attach. 5, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Order Resolving Parties Disputed Language, Order No. PSC-03-0395-FOF-TP (Fla. Pub. Serv. Comm'n Mar. 21, 2003) (*Florida Mar. 21, 2003 Order*); BellSouth Petition, Attach. 6, *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order Approving Interconnection Agreement, Order No. PSC-03-0690-FOF-TP (Fla. Pub. Serv. Comm'n June 9, 2003).

[26] *Florida June 5, 2002 FDN Order* at 11; *id.* at 10 (asserting that its ruling is consistent with Florida law and section 251 of the Act). The Florida Commission permits BellSouth to provide FastAccess service "on a separate line if the transition is 'seamless.'" BellSouth Petition at n.7. The Florida Commission also found that BellSouth's practices violate section 202 of Act. *Florida June 5, 2002 FDN Order* at 10-11.

[27] *Florida June 5, 2002 FDN Order* at 11.

[28] BellSouth Petition, Attach. 7, *Petition by BellSouth Telecommunications, Inc. for Arbitration*, Docket No. 001305-TP, Order on Procedural Motions and Motions for Reconsideration, Order No. PSC-02-0878-FOF-TP, at 50-51 (Fla. Pub. Serv. Comm'n July 1, 2002) (*Florida July 1, 2002 Supra Order*).

[29] *BellSouth Telecommunications, Inc. v. Florida Digital Network, Inc.*, No. 4:03cv212-RH (N.D. Fla.); *BellSouth Telecommunications, Inc. v. Supra Telecommunications & Info. Sys. Inc.*, No. 4:02-CV-325-SM (N.D. Fla.). *See* BellSouth Petition at 7. The court has stayed temporarily further action in each of these cases, pending Commission action on the BellSouth Petition. *See* Order Staying Proceedings and Requiring Status Reports, *BellSouth Telecommunications, Inc. v. Florida Digital Network, Inc.*, No. 4:03cv212-RH (N.D. Fla. Feb. 24, 2004) *in* Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed March 5, 2004) (BellSouth March 5 *Ex Parte* Letter); Order Granting Motion to Stay, *BellSouth Telecommunications, Inc. v. Supra Telecommunications & Info. Sys. Inc.*, No. 4:02-CV-325-SM (N.D. Fla. Mar. 16, 2004) *in* Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed May 10, 2004) (BellSouth May 10 *Ex Parte* Letter).

[30] BellSouth Petition, Attach. 8, *Petition of Cinergy Communications Co. for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-00432, Order (Ky. Pub. Serv. Comm'n July 12, 2002) (*Kentucky July 12, 2002 Cinergy Order*); BellSouth Petition, Attach. 9, *Petition of Cinergy Communications Co. for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-432, Order (Ky. Pub. Serv. Comm'n Oct. 15, 2002) (*Kentucky Oct. 15, 2002 Cinergy Order*); BellSouth Petition, Attach. 10, *Petition of Cinergy Communications Co. for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-432, Order (Ky. Pub. Serv. Comm'n Feb. 28, 2003).

Commission found that BellSouth's "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[31] The Kentucky Commission found that sections 252 and 251(d)(3) provided it with jurisdiction to establish, via an interconnection arbitration, unbundling obligations in addition to those established by the Commission.[32]

12. On December 29, 2003, the U.S. District Court for the Eastern District of Kentucky rejected BellSouth's ensuing appeal and upheld the Kentucky Commission's arbitration decision.[33] The court upheld the Kentucky Commission's decision finding that the state agency had jurisdiction and authority to impose this condition in the arbitration process. Although decided several months after the Commission released the *Triennial Review Order*, the court's opinion does not discuss the Commission's rules regarding unbundled access to the mass market loops, including the LFPL.[34] BellSouth has appealed this decision to the U.S. Court of Appeals for the Sixth Circuit.[35]

13. *Louisiana*. On April 4, 2003, in a rulemaking proceeding stemming from issues originally raised in BellSouth's section 271 proceeding, the Louisiana Public Service Commission (Louisiana Commission) required BellSouth to provide its wholesale DSL service and its retail FastAccess service to customers that change their voice service to a UNE-P competitive LEC.[36] Specifically, the Louisiana Commission found that "BellSouth's policy of refusing to provide its DSL service over CLEC voice

[31] *Kentucky July 12, 2002 Cinergy Order* at 7.

[32] *Kentucky July 12, 2002 Cinergy Order* at 2.

[33] *BellSouth v. Cinergy*, 297 F. Supp.2d 496 (E.D.Ky. 2003). BellSouth appealed the Kentucky Commission decision on two additional grounds. First, BellSouth argued that the Kentucky Commission's decision involved consideration of an issue not raised in the original arbitration petition. The Court found that the Kentucky Commission had the authority to consider this issue because the issue arose throughout the arbitration proceeding without objection from BellSouth, and because it was "directly related to a "line splitting" issue raised in the original arbitration petition. Second, BellSouth argued that the Kentucky Commission's decision was "arbitrary and capricious" because it was not supported by the record. The court disagreed with BellSouth and found that the Kentucky Commission's decision was supported by a reasonable explanation in its arbitration order of the "chilling" effect of BellSouth's refusal to sell DSL to competitive LEC customers.

[34] We note that while the Kentucky Commission's decision pre-dated the August 2003 release of the *Triennial Review Order*, the court's opinion did not. That opinion nevertheless contains no discussion of any federal rules addressing line sharing, line splitting, "reverse line sharing," or DSL in general. Without discussing the Commission's findings in the *Triennial Review Order*, the court held the Commission had not preempted the states on this issue.

[35] *BellSouth Telecommunications, Inc. v. Cinergy*, No. 04-5128 (6th Cir.). The court is holding in abeyance further action in this case, pending Commission action on the BellSouth Petition. *See* BellSouth March 5 *Ex Parte* Letter) (attaching court instructions).

[36] BellSouth Petition, Attach. 11, *BellSouth's Provision of ADSL Service to End-Users over CLEC Loops*, Docket No. R-26173, Order, No. R-26173 (La. Pub. Serv. Comm'n Jan. 24, 2003) (*Louisiana Jan. 24, 2003 Order*); BellSouth Petition, Attach. 12, *BellSouth's Provision of ADSL Service to End-Users over CLEC Loops*, Docket No. R-26173, Clarification Order, Order, No. R-26173-A (La. Pub. Serv. Comm'n Apr. 4, 2003) (*Louisiana Apr. 4, 2003 Clarification Order*).

loops is clearly at odds with [Louisiana] Commission's policy to encourage competition."[37] The Louisiana Commission based its jurisdiction for this rulemaking on the Louisiana Constitution, which grants the Louisiana Commission the power to regulate common carriers and public utilities; the corresponding Louisiana Commission regulations prohibiting tying; and the FCC's line sharing rules.[38] Notably, in requiring BellSouth to offer DSL, the Louisiana Commission stated that "it does not regulate the rates of pricing of BellSouth's wholesale or retail DSL service."[39] BellSouth has appealed this case to the U.S. District Court for the Middle District of Louisiana.[40]

14. *Georgia*. On October 21, 2003, pursuant to a complaint alleging violation of a state-approved interconnection agreement between BellSouth and MCI, the Georgia Public Service Commission (Georgia Commission) concluded that BellSouth's policy of not providing DSL service to end user customers of competitive LECs providing service using UNE loops violates the interconnection agreement as well as state law.[41] The Georgia Commission relied upon section 252 and its enabling statute granting the Georgia Commission authority over telecommunications carriers in Georgia, and on state antitrust laws. The Georgia Commission concluded that BellSouth's policy of offering its retail Internet access DSL product, FastAccess, only on BellSouth voice lines was contrary to its interconnection agreement with WorldCom, as well as in violation of a provision of Georgia law prohibiting anticompetitive practices such as tying arrangements.[42] BellSouth has appealed this decision to the U.S. District Court for the Northern District of Georgia.[43]

15. *Other State Proceedings*. BellSouth explains that state commissions in its region have before them additional pending complaints or arbitration proceedings on this same issue.[44] We also note that

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[37] *Louisiana Jan. 24, 2003 Order* at 5.

[38] *Louisiana Jan. 24, 2003 Order* at 3-4; *Louisiana Apr. 4, 2003 Clarification Order* at 7-8.

[39] *Louisiana Jan. 24, 2003 Order* at 14-15.

[40] *BellSouth Telecoms., Inc. v. Louisiana Pub. Serv. Comm'n*, No. 03-CV-372-D (M.D. La.). The court has stayed temporarily further action in this case, pending Commission action on the BellSouth Petition. Ruling on Motion to Stay, *BellSouth Telecoms., Inc. v. Louisiana Pub. Serv. Comm'n*, No. 03-CV0-372-D, Order (M.D. La. Apr. 6, 2004) *in* BellSouth May 10 *Ex Parte* Letter.

[41] BellSouth Petition, Attach. 13, *Petition of MCImetro Access Transmission Services, LLC et al. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 11901-U, Order on Complaint at 1 (Ga. Pub. Serv. Comm'n Nov. 19, 2003) (*Georgia Nov. 19, 2003 Order*).

[42] *Georgia Nov. 19, 2003 Order* at 20. Notably, the Georgia Commission adopted much of the Florida Commission's reasoning from the BellSouth/FDN arbitration. *Georgia Nov. 19, 2003 Order* at 18. The Georgia Commission also found that its decision did not conflict with BellSouth's federal DSL tariff. *Id.* at 3-4.

[43] *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services LLC*, No. 1:03-CV-3946-RLV (N.D.Ga.). The court has stayed further action in this case, pending Commission action on the BellSouth Petition. *See* Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services LLC*, No. 1:03-CV-3946-RLV (N.D.Ga. Mar. 8, 2004) *in* BellSouth May 10 *Ex Parte* Letter.

[44] *See* BellSouth Petition at 9 & Attachs. 14-16; *Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited Relief*, Case 020507-TL (Fla. Pub. Serv. Comm'n filed June 12, 2002).

two state commissions in its region have reached decisions on this issue favorable to BellSouth[45] and that state commissions outside of BellSouth's region have faced this issue.[46]

C. BellSouth's Petition

16. On December 9, 2003, BellSouth filed its request for a declaratory ruling requesting that the Commission preempt state commission decisions that require incumbent LECs to provide DSL service to end users utilizing competitive LEC UNE voice lines.[47] Specifically, BellSouth bases its request on three grounds. First, BellSouth asserts that the state decisions conflict with, and substantially prevent the implementation of, the Commission's unbundling rules in the *Triennial Review Order*.[48] Second, BellSouth argues that the state commission decisions are an unlawful regulation of information services.[49] Third, BellSouth avers that the state commission decisions conflict with the Commission's jurisdiction as the exclusive regulator of the provision of interstate DSL services.[50]

III. DISCUSSION

17. As explained below, we find that BellSouth presents an issue that is appropriate for Commission action. We then find that the state rulings raised by BellSouth's petition are inconsistent with and substantially prevent the implementation of federal unbundling rules and policies developed by the Commission in the *Triennial Review Order*, and those rulings therefore exceed the Act's reservation of state authority with regard to unbundling determinations. Finally, we conclude that it is unnecessary for us to reach conclusions on the other grounds on which BellSouth seeks relief from these state orders, including arguments concerning interstate tariffs and information services statutory classification.

18. As an initial matter, as mentioned above, regulatory requirements have changed since state commissions have considered this issue.[51] While much of this Order addresses the law set forth in the Commission's *Triennial Review Order*, we discuss here the changes in law resulting from the *Triennial Review Remand Order*. Significantly, we note that the state decisions we address in this Order arise

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[45] BellSouth Petition, Attach. 1, *Petition of IDS Telecom, LLC for Arbitration*, Docket No. 2001-19-C, Order on Arbitration, Order No. 2001-286 (S.C. Pub. Serv. Comm'n Apr. 3, 2001); BellSouth Petition, Attach. 2, *Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Service*, Docket No. P-55, Sub. 1022, Order and Advisory Opinion Regarding Section 271 Requirements (N.C. Pub. Utils. Comm'n July 9, 2002).

[46] BellSouth Petition at 9-10 & Attachs. 17-19 (descrbing some state commission decisions declining to require incumbent LECs to provide access to DSL over UNE loops, as well as noting some other states with open proceedings on the issue); Letter from Edwin J. Shimizu, Director – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed Jan. 7, 2005) (attaching a decision by the Maryland Commission requiring Verizon to continue to provide DSL to customers that discontinue Verizon's voice service and who switch to a competitor's voice services).

[47] *See* BellSouth Petition, *supra* note 1.

[48] BellSouth Petition at 3-5, 10-17.

[49] BellSouth Petition at 4-5, 17-25.

[50] BellSouth Petition at 4-5, 25-30.

[51] *See supra* para. 8; *see also infra* note 66.

primarily or exclusively in the context of competing carriers providing UNE-P to customers that want DSL service from BellSouth.[52] Further, the Commission has recently determined not to permit competing carriers unbundled access to mass market circuit switching, the critical element defining UNE-P. Therefore, we find that many of the questions resolved here will soon become moot.[53] Nevertheless, recognizing that there are other means for competing carriers to serve customers, such as through the use of UNE-L, we clarify the Commission's loop unbundling policies in this Order.

A. Procedural Issues

19. *Authority*. We reject commenters' contentions that BellSouth's petition, which seeks to prevent state imposition of certain unbundling terms, can only be filed pursuant to section 253 of the Act.[54] Section 253 charges the Commission to preempt state or local requirements that prohibit entities from providing telecommunications services. The addition of this section did not signal an intention to remove the Commission's authority to declare that a state law conflicts with federal laws.[55] Indeed, as explained in further detail below, section 251(d)(3) of the Act independently establishes a standard very similar to the judicial conflict preemption doctrine.[56] Even without such authority, the Supreme Court has repeatedly recognized that federal agencies have very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute.[57] Moreover, in addition to section 251(d)(3) jurisdiction in the 1996 Act, Congress accorded to the Commission direct jurisdiction over certain aspects of intrastate communications pursuant to section 251 of the 1996 Act.[58] The Commission implemented section 251 in the *Triennial Review Order* and reaffirmed the mechanism for parties to file a petition such as BellSouth's seeking to determine where there exists a conflict between federal and state unbundling rules.[59] In any event, we conclude that the plain language of section 251 and of the *Triennial Review Order* empowers the Commission to declare whether a state commission decision is inconsistent with or substantially prevents implementation of the Commission's unbundling rules. This authority is separate and distinct from the preemptive powers detailed in section 253.

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[52] *See supra* paras. 9-14.

[53] *See supra* para. 7 (describing the Commission's conclusion, as well as the 12-month transition period during which incumbent LECs are required to continue to unbundle UNE-P for preexisting customers).

[54] PACE Coalition Comments at 14-16.

[55] *See* 47 U.S.C. § 253.

[56] 47 U.S.C. § 251(d)(3); *Triennial Review Order*, 18 FCC Rcd at 17100, para. 193; *see infra* Part III.B.1. While we state that the judicial conflict preemption doctrine is "similar to" the authority provided by section 251(d)(3), we note that section 251(d)(3) may grant the Commission broader preemption authority than the judicial doctrine.

[57] *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2003) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof."); *see also* U.S. CONST. Art. 6, § 2.

[58] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."); *id.* at 381 n.8 ("Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.").

[59] *Triennial Review Order*, 18 FCC Rcd at 17101, para. 195.

20. *Section 252 Arbitration Issues.* We reject the argument that because the Act specifies that state arbitration decisions are to be appealed to federal district court under section 252(e)(6), the Commission has no authority to issue a declaratory order regarding state arbitrations decisions.[60] Section 252 of the Act provides, among other things, that parties to a proposed interconnection agreement may resolve open issues by requesting the respective state commission to act as an arbiter.[61] If a state arbitrates an agreement, the state commission must "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."[62] The Commission has found "that state action, whether taken in the course of a rulemaking *or during the review of an interconnection agreement*, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C)."[63] Therefore, we conclude that section 252(e)(6) does not prevent us from issuing an order or declaratory ruling that a state arbitration decision conflicts with federal law.[64] Further, we find that this Order will help to clarify the scope of our existing rules to settle a controversy and to maintain the integrity of the Commission's national policies. Therefore, to the extent that a state commission's section 252 arbitration decision conflicts with a Commission regulation adopted pursuant to section 251, we find that the state commission has an obligation to "ensure that [the agreement] meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."[65]

B. Conflict Between State Orders and the Commission's Unbundling Rules

21. We find that each of the state commission decisions at issue here – either expressly or implicitly – conditions the terms on which BellSouth must offer competitive LECs unbundled access to its local loops in a manner inconsistent with the 1996 Act and our implementing regulations.[66] In this section, we discuss the three prongs of section 251(d)(3), and explain why the state decisions at issue here fail to meet two of these three statutory requirements on independent bases, and are thus subject to preemption.

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[60] 47 U.S.C. § 252(e)(6); Z-Tel Comments at 31-33; *see also* Supra Comments at 7.

[61] 47 U.S.C. § 252(b).

[62] 47 U.S.C. § 252(c).

[63] *Triennial Review Order*, 18 FCC Rcd at 17100-01, para. 194 (emphasis added). Indeed, section 251(d)(3) applies to "*any* regulation, order, or policy of a State commission that [ ] establishes access and interconnection obligations of local exchange carriers." 47 U.S.C. § 251(d)(3) (emphasis added).

[64] We anticipate that parties will use the conclusions in this Order in the existing federal court proceedings brought pursuant to section 252(e)(6) of the Act.

[65] 47 U.S.C. § 252(c)(1).

[66] As noted above, we make this determination under the Commission's rules adopted in its *Triennial Review Order*, released on August 21, 2003. We note that all but one of the state decisions at issue were decided prior to the release of the Commission's *Triennial Review Order* on which we base our decision. Notably, most states determined *prior* to the release of the *Triennial Review Order* that, "the FCC's determination on this issue [was] not, and d[id] not purport to be, preemptive." *Kentucky Cinergy July 12, 2002 Arbitration Order* at 2; *see also Louisiana Jan. 24, 2003 Order* at 6-8; *Florida June 5, 2002 FDN Order* at 10; *but see Georgia Nov. 19, 2003 Order* at 7 (failing to address the Commission's *Triennial Review Order* conclusions).

1. The Scope of Section 251(d)(3)

22. The Act establishes – and courts have confirmed – the primacy of federal authority with regard to several of the local competition provisions in the 1996 Act. First, section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act."[67] As the Supreme Court has noted, this provision "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies" – including, of course, unbundling and other issues addressed by section 251.[68] Second, except in limited cases, the Commission's prerogatives with regard to local competition supersede state jurisdiction over these matters.[69] In the Supreme Court's words, "the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."[70]

23. Accordingly, the reach of the states' authority with regard to local competition is governed principally by federal law. Section 251(d)(3) addresses state authority to prescribe regulations relating to unbundling.[71] Specifically, that subsection provides that "the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and

[67] 47 U.S.C. § 201(b).

[68] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999) (emphasis in original).

[69] The Act, for example, expressly assigns to the states the authority to arbitrate interconnection disputes among carriers, and, subject to the general framework set forth by the Commission, to establish appropriate rates for competitive carrier's use of unbundled network elements. *See generally* 47 U.S.C. § 252. As discussed below, moreover, the Act preserves to the states circumscribed authority to mandate unbundling of particular network elements. *See* 47 U.S.C. § 251(d)(3); *see also infra.* paras. 22-30.

[70] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n. 6 (1999). *See also Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law."); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("[T]he Act *limited* state commissions' authority to regulate local telecommunications competition."); *MCI Telecom Corp. v. Illinois Bell*, 222 F.3d 323, 342-43 (7th Cir. 2000) (stating, "with the 1996 Telecommunications Act . . . Congress *did* take over some aspects of the telecommunications industry," and "Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms").

[71] The Commission examined the reach of states' authority under section 251(d)(3) in its *Triennial Review Order*. 18 FCC Rcd at 17092-101, paras. 179-96. There, we rejected both the argument "that the states are preempted from [issuing unbundling requirements] as a matter of law" and the contrary argument "that the states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id.* at 17099, para. 192. Rather, "[b]ased on the plain language of the statute, we conclude[d] that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not 'substantially prevent' the implementation of the federal regulatory regime." *Id.* at 17100, para. 193. These limitations, we concluded, apply irrespective of whether the state action at issue was taken "in the course of a rulemaking or during the review of an interconnection agreement." *Id.* We note that our interpretation of section 251(d)(3) comports with the Supreme Court's practice of "declin[ing] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, 529 U.S. 89, 106 (2000) (refusing to construe clause allowing states to impose penalties for oil-related pollution in statute specifying allocation of state and federal authority as permitting broader state regulation); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

interconnection obligations of local exchange carriers; (B) is consistent with the requirements of [section 251]; *and* (C) does not substantially prevent implementation of the requirements of [section 251] and the purposes of [sections 251 through 261]."[72] As such, section 251(d)(3) preserves state authority concerning access and interconnection obligations only when two conditions are met.[73] Its protections do *not* apply when the state regulation is inconsistent with the requirements of section 251,[74] *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act.[75] In the *Triennial Review Order*, the Commission specifically directed that a party believing a particular state unbundling obligation to be inconsistent with section 251(d)(3)'s terms "may seek a declaratory ruling from this Commission."[76] Such a petition for declaratory ruling would be filed pursuant to sections 4(i) and 4(j) of the Act and section 1.2 of the Commission's rules.[77]

[72] 47 U.S.C. § 251(d)(3) (emphasis added).

[73] Thus, Congress not only intended that federal authority supercede conflicting state authority in this area, it enumerated the specific standard. *See Verizon North v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("Congress has clearly stated its intent to supercede state laws that are inconsistent with the provisions of the [1996 Act]"); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("The critical question in any pre-emption analysis is always whether Congress intended that the federal regulations supercede state law").

[74] Several parties assert that section 252(e)(3) of the Act applies here because it preserves state commission authority to enforce state laws in the course of reviewing carrier interconnection agreements. 47 U.S.C. § 252(e)(3); *see also, e.g.*, AT&T & CompTel/Ascent Comments at 15. While 252(e)(3) preserves state commission authority to enforce state laws, we find that, even if made in the context of the state commission's review of interconnection agreements pursuant to section 252, state commission decisions that "establish[ ] access and interconnection obligations of incumbent local exchange carriers" are constrained by the limitations on state authority enumerated in section 251(d)(3) of the Act. Likewise, the specific and express provisions in section 251(d)(3) control here despite the broad savings clause language in section 601(c) of the Act, and notably, section 601(c) includes the clause "unless expressly so provided in such Act or amendments." 47 U.S.C. §152 nt; *but see, e.g.*, MCI Comments at 13.

[75] A separate statutory provision, section 261, preserves state authority to impose requirements on intrastate services that are "necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with [section 251 through 261] or the Commission's regulations to implement [those sections]." 47 U.S.C. § 261. As explained below, in analyzing application of the section 251(d)(3) requirements to this matter, the state actions at issue here are in fact inconsistent with the requirements of section 251(c)(3) and our implementing regulations. *See infra* paras. 24-30. *See generally Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citing the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," particularly where the provisions at issue are "interrelat[ed]" and in "close proximity" to one another). For this reason, section 261 does not shield those state actions, and we do not further discuss that provision here. *See Wisconsin Bell v. AT&T Communications of Wisconsin, L.P.*, No. 03-C-671-S, slip op. at 21 (W.D. Wisc. July 1, 2004) (holding that the state commission could not require this under its residual state authority in section 261(c) because this "provision is directly inconsistent with the FCC regulations implementing the Act and the reasoning underlying those regulations"), *in* Letter from Sean A. Lev, Counsel for BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed July 6, 2004).

[76] *Triennial Review Order*, 18 FCC Rcd at 17101, para. 195

[77] 47 U.S.C. §§ 154(i), (j); 47 C.F.R. § 1.2.

2. The Application of Section 251(d)(3)

24. As an initial matter, we find that the state commission requirements that BellSouth provide DSL Internet access service over the high frequency portion of a competitive LEC's UNE loop establish unbundling requirements that are properly evaluated under section 251(d)(3)(A). The scope of section 251(d)(3) is limited to "any regulation, order, or policy . . . that [] establishes access and interconnection obligations of incumbent local exchange carriers" and thus, encompasses state requirements on BellSouth to provide unbundled access to network elements.[78]

25. We find that state decisions that require BellSouth to provide DSL service over the HFPL while a competitive LEC provides voice service over the low frequency portion of a UNE loop facility effectively require unbundling of the LFPL.[79] Although a competitive LEC officially leases the entire loop, state commission requirements that require BellSouth to provide DSL over the same loop effectively take back the HFPL from the competitive LEC, thus leaving the competitive LEC with only the remaining LFPL.[80] In effect, therefore, this scenario requires an incumbent LEC to provide unbundled access to only the LFPL, an element that the Commission expressly declined to unbundle.[81]

26. Specifically, state commission decisions that require BellSouth to provide DSL service over the high frequency portion of a competitive LEC's UNE loop violate section 251(d)(3)(B) because such decisions directly conflict and are inconsistent with the Commission's rules and policies implementing section 251.[82] The Commission concluded in the *Triennial Review Order* that unbundling the LFPL "is

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[78] 47 U.S.C. § 251(d)(3).

[79] The state commission decisions that BellSouth disputes require the sharing of a UNE loop between BellSouth (providing DSL over the HFPL) and a competitive LEC (providing voice over the LFPL). *See supra* paras. 9-14. For example, the Kentucky Commission requires that "the high frequency spectrum on the UNE-P" will be used by "BellSouth to provision DSL transport on the same loop as the UNE-P-based voice service." *Kentucky Feb. 28, 2003 Cinergy Order*, App. A at 1. The Florida Commission permitted BellSouth to provide DSL Internet access services to UNE competitive LEC customers over a separate loop, although "BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop." *Florida Mar. 21, 2003 Order* at 6-8. We do not address in this Order the legitimacy of a separate loop requirement, although we note that such a state requirement might impose a condition upon BellSouth's interstate tariff in violation of the filed rate doctrine. *But cf. infra* note 101. Nevertheless, these state commission decisions were made regarding UNE obligations and each state commission reviewed the effect its decision would have on UNE-based competition. *See supra* paras. 9-14. We do not fault these state commissions for tackling these difficult unbundling policy decisions.

[80] *See infra* note 87 (describing similar reasoning recently adopted by a U.S. District Court judge).

[81] Indeed several state commissions have addressed this "lease back" issue including the Georgia Commission which found that requiring "BellSouth to discontinue its policy is contingent upon MCI not imposing a charge on BellSouth for accessing the high frequency portion of the line that it leases from BellSouth." *Georgia Nov. 19, 2003 Order* at 19; *see also, e.g., Louisiana Apr. 4, 2003 Clarification Order* at 14 (adopting the recommendation that "CLECs should be prevented from charging BellSouth for the use of the high frequency portion of the loop"); *see Kentucky Feb. 28, 2003 Cinergy Order*, App. A at 1 ("Cinergy shall make available to BellSouth at no charge the high frequency spectrum on the UNE-P for purposes of enabling BellSouth to provision DSL transport on the same loop as the UNE-P-based voice service").

[82] As described above, state commission regulations implementing the requirements of section 251 must be "consistent with the requirements of this section." 47 U.S.C. § 251(d)(3)(B).

not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service."[83] Importantly, the Commission supported its determinations with rules that enable a competing carrier that does not provide all of the services a customer may want, to team with another competing carrier in order to provide other complementary services over the same loop facility.[84] This determination directly addresses incumbent LECs' 251(c) unbundling obligations relating to the provision of DSL service. We note that the D.C. Circuit affirmed these conclusions.[85]

27. State requirements that impose on BellSouth a requirement to unbundle the LFPL do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B).[86] Indeed, a U.S. District Court recently held that a state commission requirement for an incumbent LEC "to continue to provide all existing data services in the [HFPL] . . . to any customer that chooses [the competitive LEC] as their local service carrier for voice . . . is functionally identical to compelled unbundling of the HFPL and LFPL and therefore cannot be sustained as consistent with federal law."[87] State decisions that require BellSouth to provide its DSL service over a competitive LEC's leased UNE loop facility impose a condition on the UNE facility that effectively unbundles the LFPL, and is therefore inconsistent with federal law.

28. The *Triennial Review Order* applied to mass market loops, including the LFPL, the Commission's revised impairment framework, which requires that the impairment analysis examine

[83] *Triennial Review Order*, 18 FCC Rcd at 17141, para. 270 (parenthetical in original).

[84] *Triennial Review Order*, 18 FCC Rcd at 17130-31, paras. 251-52 (line splitting). The Commission defined line splitting as "the scenario where one competitive LEC provides narrowband voice service over the low frequency portion of the loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop." *Triennial Review Order*, 18 FCC Rcd at 17130, para. 251; 47 C.F.R. §51.319(a)(1)(ii). *See also, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17141, para. 270 ("partnering with a second competitive LEC"), 17130-31, para. 252 ("competitive LECs . . . line split with another competitive LEC"), 17133, para. 257 ("requesting carriers [] obtain the HFPL from another competitive LEC (*i.e.*, what the Commission subsequently termed 'line splitting')"), 17134, para. 259 ("competitive LECs . . . obtain the HFPL from other competitive LECs through line splitting").

[85] *USTA II*, 359 F.3d at 584-85.

[86] *See Triennial Review Order*, 18 FCC Rcd at 17101, 17141, paras. 195, 270; *Indiana Bell Tel. Co. v. McCarty*, 363 F.3d 378 (7th Cir. 2004) (finding that a state requirement to unbundle packet switching for which the Commission found no impairment is "not entirely foreclose[d]," but, referencing paragraphs 192 and 195 of the *Triennial Review Order*, noted, "we observe that only in very limited circumstances, which we cannot now imagine, will a state be able to craft a packet switching unbundling requirement that will comply with the Act").

[87] *Wisconsin Bell v. AT&T*, slip op. at 20. The court continued its reasoning by stating, "[w]hile the entire unbundled local loop is nominally leased to [AT&T], the compelled lease back of the HFPL by plaintiff from the defendant leaves the parties in the exact same position as if the LFPL were unbundled and transferred separately. The provision is nothing more than a thinly veiled unbundling of the local loop portions which was expressly rejected by the FCC." *Id.* at 20-21. The court concluded by stating that the "agreement provision is directly inconsistent with the FCC regulations implementing the Act and the reasoning underlying those regulations." *Id.* at 21.

whether "*all* potential revenues from entering a market exceed the costs of entry."[88] In doing so, the Commission stated, "we take into [] account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (*i.e.*, VoDSL), data, and video services."[89] In considering all of the possible revenues from services that competing carriers can obtain from a loop facility, the Commission not only considered the services a competing carrier could provide on its own, but the services that competing carriers, working cooperatively with other competing carriers, could offer. The Commission more recently clarified in its *Triennial Review Remand Order* that its impairment standard refers to a "reasonably efficient competitor" and that "[w]e consider *all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell, taking into account limitations on entrants' ability to provide multiple services, such as diseconomies of scope in production, management, and advertising."[90]

29. After applying the Commission's new impairment standard to mass market loop facilities, the Commission weighed the benefits of unbundling against the costs of unbundling, including the potential of depressing competitive incentives to deploy facilities.[91] Specifically, the Commission identified section 706 goals as pertinent to its unbundling analysis of loop facilities and incorporated these goals into its ultimate unbundling determinations for the LFPL.[92] As noted above, section 706 of the Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[93] Among the mechanisms section 706 provides that the Commission achieve this goal is to "remove barriers to infrastructure investment."[94] Thus, the Commission's determinations regarding LFPL unbundling incorporate the additional goals and obligations of section 706 and establish deployment of broadband facilities as a goal of the Act that is incorporated into the Commission's unbundling determinations.

30. As stated above, the Commission based it decision not to unbundle the LFPL on the availability of line splitting between competing carriers in order to advance the goals of the Act by spurring

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[88] *Triennial Review Order*, 18 FCC Rcd at 17133-34, para. 258 (emphasis in original); *id.* at 17035, para. 84; *id.* at 17142-43, para. 274.

[89] *Triennial Review Order*, 18 FCC Rcd at 17133-34, para. 258. This is in contrast to the previous standard which focused "only on the revenues derived from an individual service." *Id.*

[90] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket Nos. 04-313, 01-338, Order on Remand, FCC 04-290, para. 24 (rel. Feb. 4, 2005) (*Triennial Review Remand Order*) (emphasis in original) (footnote omitted).

[91] *Triennial Review Order*, 18 FCC Rcd at 17133, para. 256 (citing *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*)).

[92] The Commission incorporated the goals of section 706 into its mass market loop impairment analysis using the "at a minimum" language in section 251(d)(2), which the Commission interpreted to allow consideration of factors other than the "necessary" and "impair" requirements when assessing unbundling requirements. *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17086-92, 17125-27, paras. 172-78, 242-44. The D.C. Circuit has affirmed the incorporation of section 706 goals into the Commission's section 251(d)(2) analysis. *USTA II*, 359 F.3d at 572, 579-82.

[93] 47 U.S.C. § 157 nt.

[94] 47 U.S.C. § 157 nt.

"innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings."[95] Under these state commission decisions, incumbent LECs and competitive LECs would face a decidedly different set of incentives for the deployment of broadband facilities.[96] Thus, these state requirements undermine the effectiveness of the incentives for deployment, including the advancement of section 706 goals that were at the heart of the Commission's mass market loop unbundling rules, and therefore do not pass muster under section 251(d)(3)(C) of the Act.[97]

C. Additional Arguments

1. Policy Arguments

31. We do not reach conclusions on issues raised by commenters that are outside the scope of our review in this Order. For example, several commenters argue that BellSouth's policy of offering DSL to only BellSouth voice customers is anticompetitive and is not justified as a means to spur investment.[98] First, we do not revisit the same policy issues that were raised and addressed by the Commission in the *Triennial Review Order*. Given that the unbundling policy issues raised by commenters in this proceeding were addressed in the *Triennial Review Order*, we are not inclined to reconsider our decisions here.[99] Second, the Commission has reviewed this practice with respect to UNE-P carriers and found the practice not to be discriminatory due to the alternative that line splitting rules enable.[100] Third, to the extent that parties raise claims of anticompetitive tying, we issue the attached *Notice of Inquiry* to seek further comment on this issue.[101] Accordingly, we reject comments arguing that we should not grant

[95] *Triennial Review Order*, 18 FCC Rcd at 17135, para. 261.

[96] We note that several commenters dispute the Commission's findings in the *Triennial Review Order*, including the Commission's arguments regarding incentives for deployment. *See, e.g.*, AT&T & CompTel/ASCENT Comments at 24-26; MCI Comments at 19; Supra Comments at 13-19; Z-Tel Comments at 9-11. Because in this Order we are only elucidating the Commission's previously expressed policies, we do not address in this Order the premise of the Commission's previous findings. *See infra* Part III.C.1.

[97] *Cf. Wisconsin Bell v. AT&T*, slip op. at 21-22 (noting that the Commission weighed the impact on competition and deferring to the Commission's judgment that "competition would be best served through partnerships between competitive LECs.").

[98] *See, e.g.*, AT&T & CompTel/ASCENT Comments at 5-10 (arguing that states decisions properly address anti-competitive bundling practices of BellSouth that lock customers in to BellSouth voice service); Louisiana PSC Comments at 4 (characterizing BellSouth's policy as anti-competitive); Supra Comments at 14-17 (contending that state decisions promote competition and encourage deployment of new technologies); Supra Comments at 26-27 (asserting that the same rationale for requiring local number portability apply to state actions, including enhancing competition and encouraging flexibility); Vonage Comments at 3-8 (stating that BellSouth's policy hurts consumers and suppresses demand for competitive broadband and voice services); *Georgia Nov. 19, 2003 Order* at 9-19.

[99] *Triennial Review Order*, 18 FCC Rcd at 17141, para. 270 (rejecting comment suggesting that the Commission should separately unbundle the LFPL used to transmit voice signals); *see also Triennial Review Order*, 18 FCC Rcd at 17130-41, paras. 251-70. We note that the *USTA II* court expressly upheld our line sharing and mass market loop rules. *USTA II*, 359 F.3d at 578-85.

[100] *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9100-01, para. 157

[101] Thus, we limit our discussion in this Order to the section 251 unbundling policies of the Commission set forth in the *Triennial Review Order*. We expressly raise the issue of discriminatory or anticompetitive tying of two services (continued....)

BellSouth's petition on the basis of competitive concerns the Commission recently addressed or that we should reconsider our prior determinations regarding line sharing requirements. We want to make clear, however, the narrow and limited nature of this ruling, and we do not in any way prejudice the questions of possible anticompetitive or discriminatory behavior raised in the attached *Notice of Inquiry*.

2. Interstate and Information Services

32. We do not address BellSouth's argument that the state decisions unlawfully regulate BellSouth's DSL service because it is an interstate service. Specifically, in its petition, BellSouth maintains that its federally tariffed DSL service offering qualifies as an interstate service[102] and is subject only to federal tariff.[103] Several commenters dispute BellSouth's claim and argue that BellSouth's DSL wholesale service offering is subject to state regulation.[104] We decline to address this issue at this time.[105] Rather, our consideration of BellSouth's Petition in this item is in keeping with section 251(d)(3) and the Commission's *Triennial Review Order*.

33. We also do not address whether BellSouth's DSL service qualifies for exclusive federal regulation because it is an information service. Specifically, in its petition, BellSouth asserts that its retail FastAccess offering qualifies as an information service and is not subject to state regulation.[106] We find that it is neither necessary[107] nor practical to address in this proceeding the varied and complex

(Continued from previous page)
offered by a company, but make no conclusions on this issue and confine its discussion to the attached *Notice of Inquiry*.

[102] BellSouth Petition at 25-30.

[103] BellSouth Petition at 17-21, 25-30.

[104] *See e.g.*, AT&T Corp. and the CompTel/ASCENT Alliance Comments at 3-4, 16-19; MCI Comments at 20-23; Z-Tel Comments at 25-31; Alabama Commission Comments at 2; Louisiana Commission Comments at 3-4, 14-17, 21; South Carolina Commission Comments at 2; MCI Reply at 5.

[105] The D.C. Circuit recently held that "[t]he FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice." *USTA II*, 359 F.3d at 588. Because these issues are raised in other proceedings before the Commission, and in judicial proceedings in which the Commission is a party, we find that these other proceedings are more appropriate vehicles for addressing issues related to the regulation of information services. *See infra* notes 108 and 110.

[106] BellSouth Petition at 17-21. Commenters assert that the information services-related issues raised by BellSouth's petition are not ripe for adjudication. *See* AT&T Corp. and the CompTel/ASCENT Alliance Comments at 2-3, 13; Florida Digital Network Comments at 11-16; MCI Comments at 20-23; SBC Comments at 4-5; Z-Tel Comments at 23-24; DOJ/FBI/DEA Joint Comments at 3-4. These commenters argue that the issue of whether we should preempt the enforcement of the state decisions regulating information services will not be ripe for a declaratory ruling until the Commission and the various courts considering certain appeals of state and Commission proceedings have issued final decisions on this issue. *See, e.g.*, Z-Tel Comments at 23.

[107] *See supra* note 105; *see also infra* notes 108 and 110.

issues surrounding the appropriate regulatory treatment of services that the Commission currently is addressing elsewhere.[108]

3. Other Issues

34. *CALEA.* We decline to address new and novel issues that are more appropriately dealt with in other Commission proceedings. For example, commenters argue that the Commission should determine that BellSouth's wholesale and retail broadband Internet access services and its wholesale and retail DSL access services are subject to CALEA.[109] Issues regarding the applicability of CALEA requirements to specific services are more appropriately addressed in other proceedings, where the public has sufficient notice of the Commission's consideration of these issues.[110]

35. *Commingling.* Based on the language and clear intent of the *Triennial Review Order*, we reject Cinergy's assertion that our commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility.[111] In the *Triennial Review Order*, the Commission required incumbent LECs to commingle UNEs (and combinations of UNEs) with other incumbent LEC services.[112] The Commission expressly defined commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[113] Thus, the purpose of this provision is to allow a requesting carrier the opportunity to provide service to its customers by "connecting, attaching or otherwise linking" facilities obtained by UNE offerings and wholesale services.[114] Accordingly, we conclude that the Commission's commingling requirements do not apply where a competitive LEC leases an entire loop facility and seeks to have an incumbent LEC provide services over the competitive LEC's facility.[115]

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[108] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002); *Brand X Internet Serv. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) *cert. granted sub nom. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv.*, 125 S.Ct 654-55 (Dec. 3, 2004).

[109] Law Enforcement Comments at 4-6; Local Governments Jan. 16 *Ex Parte* Letter at 2-5.

[110] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, Notice of Proposed Rulemaking, 19 FCC Rcd 15676 (2004); *IP-Enabled Services NPRM*, 19 FCC Rcd at 4897, para. 50 n.158.

[111] *See* Cinergy Comments 12-16; BellSouth Reply at 17.

[112] *Triennial Review Order*, 18 FCC Rcd at 17342-48, paras. 579-84; *see* 47 C.F.R. § 51.5 (defining commingling); *cf.* 47 C.F.R. § 51.318.

[113] *Triennial Review Order*, 18 FCC Rcd at 17342, para. 579; 47 C.F.R. §51.5.

[114] *Id.*

[115] *Cf. Local Competition First Report and Order*, 11 FCC Rcd at 15631, para. 258 ("For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period").

36. *Number Portability*. Comcast Phone, Time Warner, and Bright House Networks raise arguments that incumbent LECs have unlawful internal policies of delaying number porting requests when competing voice service providers win a voice customer that also subscribes to DSL.[116] Specifically, Comcast Phone and Time Warner assert that incumbent LECs refuse to port the telephone number for the voice line until the customer cancels its DSL service. We take this opportunity to remind carriers that the Act requires,[117] and we intend to enforce, non-discriminatory number porting between LECs, including our previous conclusion "that carriers may not impose non-porting related restrictions on the porting out process."[118] Because of these requirements, when an incumbent LEC receives a request for number portability, it is required to observe the same rules, including provisioning intervals, as any other LEC and cannot avoid its obligations by pleading non-porting related complications or requirements such as the presence of DSL service on a customer's line. We also retain the authority to evaluate specific objections to incumbent LEC's porting policies in proceedings seeking enforcement action.[119]

IV. NOTICE OF INQUIRY

37. The Order, set forth above, addresses a discrete issue of broadband policy relating to section 251(c) obligations for unbundling.[120] However, our disposition of the section 251 question does not address broader questions regarding the tying or bundling of services in general that have been raised in the record of this proceeding. In this Notice of Inquiry, we seek to examine the competitive consequences when providers bundle their legacy services with new services, or "tie" such services together such that the services are not available independent from one another to end users. We seek comment on how such bundling might affect both intramodal and intermodal competition and the effect that it might have on the public interest, including benefits to consumers.[121] Several commenters in this and other proceedings have raised the possibility that bundling services potentially harms competition because consumers have to purchase redundant or unwanted services.[122] As the communications

[116] *See* Comcast Phone Reply at 1-3; Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed Oct. 27, 2004); Letter from Christopher W. Savage, Counsel for Bright House Networks Information Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed Nov. 24, 2004); Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed Nov. 29, 2004); Letter from James L. Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed March 2, 2005).

[117] 47 U.S.C. § 251(b)(2).

[118] *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975, para. 11 (2003); *see also id.* at 20975-78, paras. 14-18, 21; *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23705, 23711-12, paras. 21, 34-37 (2003).

[119] To the extent that these providers are alleging a violation of the Act, they may file a complaint pursuant to section 208 of the Act. 47 U.S.C § 208.

[120] 47 U.S.C. § 251(c).

[121] *See, e.g., Policy and Rules Concerning The Interstate, Interexchange Marketplace*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7425, 7444-45, paras. 12, 44 (2001) (*Bundling Order*).

[122] *See* MCI Comments at 2, 19; MCI Reply at 7; Vonage Comments at 20; Z-Tel Comments at 11-13 (arguing that requiring a traditional telephone line in addition to broadband access limits VoIP development as a possible replacement for traditional telephone service because it requires purchase of a redundant service). We also note that (continued....)

marketplace continues to move toward bundled solutions for consumers, we ask commenters to address specifically whether competition is supplying sufficient incentives for providers to disaggregate bundles to maximize consumer choice. We seek comment on whether such bundling behavior is harmful to competition, particularly unaffiliated providers of new services, such as voice over Internet protocol (VoIP), and if so, how this is related to several previous decisions or ongoing proceedings relating to dominance and classification issues.[123] Finally, we seek comment on our authority to impose remedies, the adequacy and costs of any potential regulatory remedies, and the least invasive regulations that could effectively remedy any potential competitive concerns.

(Continued from previous page)
similar issues have been raised or addressed in other Commission proceedings. *See, e.g.*, FCC, Report On the Packaging and Sale of Video Programming Services to the Public (Nov. 18, 2004) *in* Letter from Michael K. Powell, Chairman, FCC, to Hon. Joe Barton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Nov. 18, 2004) (evaluating the costs and benefits of a la carte pricing and tiered pricing of cable programming); *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46, CC Docket No. 87-266, Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639 (1996) (broadly discussing the question of tying and bundling with respect to cable generally); *In the Matter of Application for Consent to the Transfer of Control of Licenses and Secion 214 Authorization from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3218-20, paras. 123-26 (1999) (analyzing the potential harms of bundling); *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001) (analyzing the potential harms of bundling); *See also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (describing issues concerning the access to internet and bundling of services); Jason P. Tally, CEO, Nuvio Corporation, *White Paper on Title I Jurisdiction over Broadband Access Provider*, *in* Letter from Philip L. Malet and Carlos M. Nalda, Counsel for Nuvio Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, (filed Sept. 13, 2004) (asserting that vertical integration of broadband and VoIP providers creates a potential for discrimination against unaffiliated VoIP providers, endangering competition). We also note that state commissions are reviewing whether broadband tying practices are potentially harmful to consumers. *See, e.g.*, Georgia Public Service Commission, *PSC Approves Proceeding to Study BellSouth's DSL Policy in Response to Consumer Concerns*, Press Release (Aug. 17, 2004), *in* Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-251 (filed Aug. 18, 2004).

[123] *See Broadband Dom/Non-Dom NPRM*, 16 FCC Rcd 22745 (2001) (seeking comment on relevant product and geographic markets for determinations of dominance and questioning the market power of incumbent LECs in relevant markets for broadband services); *Title I Broadband NPRM*, 17 FCC Rcd 3019, 3029-35, paras. 19-29 (tentatively concluding that: wireline broadband Internet services are information services, subject to regulation under Title I of the Act; the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service," and; wireline broadband Internet access services do not consist of two separate services, but are a single integrated offering provided to the end-user); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799 n.1 (2002) (*Cable Modem Declaratory Ruling*), *aff'd in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *stay granted pending cert.* (April 9, 2004), *petitions for cert. filed*, Nos. 04-277 (Aug. 30, 2004), 04-281 (Aug. 27, 2004); *see also* 47 U.S.C. § 153(43).

V. PROCEDURAL MATTERS

A. Ex Parte Presentations

38. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.[124] Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented in generally required.[125] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[126]

B. Comment Filing Procedures

39. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments the Notice of Inquiry within 60 days after publication in the Federal Register and may file reply comments within 90 days after publication in the Federal Register. All filings shall refer to WC Docket No. 03-251. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. One (1) courtesy copy must be delivered to Janice M. Myles at Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, SW, Suite 5-C140, Washington, DC 20554, or via e-mail, janice.myles@fcc.gov, and one (1) copy must be sent to Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail www.bcpiweb.com.

40. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

41. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in

[124] 47 C.F.R. §§ 1.1200-1.1216.

[125] *See* 47 C.F.R. § 1.1206(b)(2).

[126] 47 C.F.R. § 1.1206(b).

receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

42. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail www.bcpiweb.com.

43. For further information regarding this proceeding, contact Ian Dillner, Competition Policy Division, Wireline Competition Bureau, (202) 418-1580, or via e-mail Ian.Dillner@fcc.gov.

VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, 252, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, and 303(r) that the petition for declaratory ruling filed by BellSouth Telecommunications, Inc. in WC Docket No. 03-251 IS GRANTED to the extent described by this Order.

45. IT IS FURTHER ORDERED that the Notice of Inquiry in WC Docket No. 03-251 IS ADOPTED.

46. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
DISSENTING IN PART, APPROVING IN PART

Re: *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers* (WC Docket No. 03-251)

In this decision, the Commission unwisely flashes the green light for broadband tying arrangements. Because we believe this is an area where the Commission should proceed with caution, we cannot support the outcome.

A tying arrangement occurs when a seller conditions the availability of one product on the buyer's purchase of a second product. Here, the incumbent carrier refused to sell DSL service to end-users who elected not to purchase voice service from the same carrier. Recognizing that this practice could limit consumer choice and reduce competition, Florida, Kentucky, Louisiana and Georgia chose to do something about it. Each state sought to put an end to tying practices that restricted the availability of broadband service to customers who also purchased analog voice service.

The majority responds to these state efforts with the heavy hammer of preemption. They bypass analysis of tying practices under the unjust or unreasonable practice standard in Section 201. Instead, they base their action on Section 251(d)(3), which expressly preserves state access regulations, provided that they are not inconsistent with federal requirements and do not "substantially prevent" implementation of the Commission's own rules. The majority reads too much into these provisions. The actions taken by Florida, Kentucky, Louisiana and Georgia do not flat-out conflict with federal rules; they arguably complement them. And as a result of this decision, state authority to craft local rules to promote competition is unnecessarily constrained.

Beyond this slap to federal-state relations is another ominous precedent for consumers. If it is permissible to deny consumers DSL if they do not also order analog voice service, what stops a carrier from denying broadband service to an end-user who has cut the cord and uses only a wireless phone? What prevents a carrier from refusing to provide DSL service to a savvy consumer who wants stand-alone broadband only for VoIP? Regrettably, these broader issues go virtually unexamined. They are relegated to a single paragraph Notice of Inquiry, appended to the back of this decision apparently as an afterthought. Because we believe that this situation requires more analysis and greater consideration of the impact on consumers, we dissent.

We join today's decision, however, in one key aspect. We support the effort in this action to reinforce non-discriminatory number porting, including between wireline and cable carriers. Congress was clear that number portability is a basic duty of local exchange carriers. Because this decision accurately clarifies this requirement, we approve in part.